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No. 91-294

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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THE MARYLAND HIGHWAY CONTRACTORS ASSOCIATION, INC.,

*Petitioner*,

v.

STATE OF MARYLAND, *et al.*,

*Respondents.*

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**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit**

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals hold correctly that this case is moot because the statute challenged in this case has been repealed?

2. Alternatively, does petitioner, a membership association of construction companies, lack standing to challenge Maryland's Minority Business Enterprise law because neither petitioner nor any of its members has suffered any injury fairly traceable to that law, and because the declaration of unconstitutionality that petitioner seeks in this case will have a definite adverse impact on some of its members?

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## COUNTERSTATEMENT OF THE CASE

### A. Proceedings below.

The sole plaintiff (and now petitioner) in this case, the Maryland Highway Contractors Association, Inc. (the "Association" or "petitioner"), filed this suit in the United States District Court for the District of Maryland seeking declaratory

and injunctive relief against the State of Maryland and several state officials (collectively the "State), claiming that Maryland's Minority Business Enterprise ("MBE") statute violates the Association's federal constitutional and statutory rights. (App. at 4a-5a.)[1] In its complaint, the Association asserted that the MBE law unlawfully discriminates against the Association and its members on the basis of race and, therefore, violates the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 2000d. (App. at 32a.)

The State answered the complaint and immediately conducted discovery aimed principally at the question of the Association's Article III standing to sue. Upon completion of that discovery, the State filed a motion for summary judgment

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[1] Citations in the form "App. at ___" are to the appendix to the Petition for Certiorari.

challenging, inter alia, the Association's standing. (App. at 32a.) The district court held a hearing on the State's motion and thereafter issued a detailed opinion dismissing this case because the undisputed facts established the Association's lack of standing. (App. at 30a-70a.)

Shortly after judgment was entered against the Association, but before the Association noted an appeal, the statutue challenged in this case was repealed and a new MBE statute became effective. 1990 Md. Laws Ch. 708, codified at Md. Ann. Code, State Finance and Procurement Art., §§ 14-301, et seq. (1990 Cum. Supp.). On appeal, the Fourth Circuit held that this case is moot because the Association's complaint challenged a law which was no longer in effect. (App. at 13a.) The appellate court went further, however, and addressed "the issue of standing in order to guide

subsequent litigation" and concluded that "the district court correctly found that the Association lacked standing to sue under the present facts." (App. at 29a.) The petition to this Court followed.

### B. The challenged (and now-repealed) statutory scheme.

It is beyond dispute that the only statute challenged in this case was repealed as of July 1, 1990. That now-repealed MBE law required that certain units of State government have procurement procedures to encourage participation by certified MBEs, and attempt to provide to MBEs a "fair share" of state contracts for the procurement of supplies and services. Md. Ann. Code, State Finance and Procurement Article, § 14-302(a)(1), (2). Specifically, various State agencies were to structure procurement procedures that "try to achieve the result that a minimum of 10% of [their] total dollar value of procurement contracts is made

directly or indirectly from certified minority business enterprises." Id., § 14-302(b)(1). With respect to contracts at the State Department of Transportation, this goal applied only to contracts in excess of $100,000. Id., § 14-302(b)(2).

The law in effect when this action was filed defined a qualifying minority business as any legal entity that is at least 51% owned or controlled by one or more members of a group "that is disadvantaged socially or economically, including: 1. Alaskan natives; 2. American Indians; 3. Asians; 4. Blacks; 5. Hispanics; 6. Pacific islanders; 7. women; or 8. physically or mentally disabled individuals." § 14-301(e).[2] The State's MBE regulations required that each contract solicitation set forth the expected degree of

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[2] The present MBE law has changed the definition of an MBE. See 1990 Md. Laws Ch. 708; App. at 10a.

MBE participation; that the affected state agency provide a list of certified MBEs to each prospective contractor; that there be uniformity of requests for bids on subcontracts and of the timing of requests and submissions of bids on subcontracts; and that the State not be fiscally disadvantaged by an inadequate response by MBEs to requests for bids. § 14-303(b); Code of Maryland Regulations (COMAR) 21.11.03.01 et seq.[3]

**C. The undisputed facts, all of which were obtained in discovery from the Association, show that Maryland's MBE law has had no adverse impact on the Association or its members.**

The State conducted discovery to determine whether the Association had

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[3] The regulations also set forth the circumstances in which MBE participation may be waived. § 14-303(b)(6). To receive a waiver, the contract bidder or offeror must make a reasonable demonstration that MBE participation is not obtainable, or is not obtainable at a reasonable price, and the state procurement agency must decide that the public interest would be served by a waiver.

standing to bring this action. (App. at 5a.) In that discovery, the Association explicitly - and repeatedly - stated that it had no evidence that anyone, let alone it or any of its members, has been injured by Maryland's MBE law.

For example, in answers to the State's interrogatories and in response to the State's request for production of documents, the Association stated that (1) it had no information concerning any member who may have lost a bid on a contract for the procurement of supplies and/or services as a result of the statute challenged in this action (App. at 19a; 51a); (2) it had no information concerning any profits lost as a result of any particular member's failure to be awarded a contract or subcontract because of the MBE statute (id.); and (3) it had no documents reflecting direct economic or business injuries to it or its members.

(App. at 19a; 44a.)

In addition, the Association's Executive Director, Robert E. Latham, testified under oath at deposition that the Association had no evidence that it lost any membership dues as a result of the MBE law and he agreed that any claim to the contrary would be "sheer speculation" (App. at 44a); Mr. Latham testified that rather than being harmed by the MBE law, in fact, the Association has been a beneficiary of the law as it gained a member, in its highest dues category, as a result of this challenge. (App. at 16a; 44a.) Mr. Latham also conceded that the Association had no data or any other evidence showing that Maryland's MBE law resulted in higher costs to anyone (App. at 52a); the Association had not undertaken any study to show that Maryland's law detrimentally affected non-MBE contractors (App. at 19a); and the Association had not been able to

identify any of its members who was denied a contract as a result of the law it challenged. (App. at 19a; 51a.)

D. The decisions below.

After noting that the State's challenge to the Association's standing "is not based solely on the pleadings", but rather "the parties have conducted extensive discovery on the issue of standing" (App. at 42a), the district court held that the Association had no standing to challenge Maryland's MBE law. Based on the evidence produced by the Association in response to the State's discovery, the court granted the State's motion for summary judgment, holding that the Association "failed to demonstrate any economic or non-economic injury to itself as a result of the challenged . . . statute . . . ." (App. at 49a.) The district court found that "the Association has failed to demonstrate that . . . [its] members have

suffered any kind of actual injury, or even suffer any threat of actual injury, as a result of being subject to the MBE statute." (App. at 60a) (emphases in original). Accordingly, the district court found that it lacked subject matter jurisdiction, and thus entered judgment in favor of the State and against the Association. (App. at 69a.)

On appeal, the Fourth Circuit found that "[i]n the interim between the district court's decision and this appeal, the Maryland legislature repealed the MBE statute at issue here and replaced it with a new one." (App. at 4a.) The Court of Appeals specifically found that the State attempted to comply with this Court's decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), by, for example, commissioning a post-Croson Minority Business Utilization Study, holding legislative hearings, and

making findings regarding discrimination in the award of State contracts. (App. at 8a-10a.) The court below vacated the district court's decision, with instructions to dismiss the case, because "the actions by the Maryland legislature had the effect of rendering the Association's case [in which it challenged a then-repealed law] moot." (App. at 11a.)

Additionally, because it believed that a future challenge to the State's newly-enacted (but not here challenged) MBE statute was likely (App. at 14a), the Fourth Circuit addressed the standing issue and affirmed the district court's holding that the Association lacked standing to sue because neither it nor its members suffered any injury as a result of the challenged law. (App. at 15a-25a.) The court also found that even if such an injury existed, the Association had no standing to sue on behalf of its members

because some of those members would be harmed, while others would be benefited, if the MBE statute were invalidated; therefore, "there are actual conflicts of interest which would require that the individual members come into the lawsuit to protect their [conflicting] interests." (App. at 27a.)

## REASONS FOR DENYING THE WRIT

### The Petition Does Not Present A Substantial Federal Question

Because the decision below conforms with prior decisions of this Court, further review of this case is unwarranted. Simply put, this is a factually unique case which raises no novel or unsettled questions of federal law on which the lower federal courts require the guidance of this Court. Indeed, some of the questions presented in the petition are so manifestly insubstantial (e.g., whether the Fourth Circuit erred in finding that a hearsay letter could not defeat the State's summary judgment motion (Pet. at 42-44)),

that they require no answer in this brief.

### A. The Statute Challenged In This Case Has Been Repealed And A New Statute Has Been Enacted; Therefore, This Case Is Moot.

The Association does not dispute the Fourth Circuit's finding that the MBE statute it challenges was repealed and replaced with a new statute effective July 1, 1990, after the district court had dismissed this case. (App. at 4a; 8a-13a.) The Association also does not dispute that it never sought any post-judgment relief to amend its complaint to challenge the now-effective law and that it has not since filed any such challenge. Therefore, this case is moot and there is no reason for this Court to exercise its discretionary jurisdiction to review the matter further, particularly in light of the Association's undisputed ability to file a challenge to the new MBE law (assuming, arguendo, that it has standing to do so). See Fusari v. Steinberg, 419 U.S. 379, 387

(1975); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414 (1972); United States v. Munsingwear, 340 U.S. 36, 39 (1950).

**B. In Any Event, As The Court Of Appeals Found, The Association Lacks Standing To Challenge The Constitutionality Of Maryland's MBE Law Because The Association Has Suffered No Injury As A Result Of That Law.**

Further, there is not a scintilla of evidence of harm to the Association or its members fairly traceable to the now-repealed MBE law challenged in this case. "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III . . . . As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of

federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 498 (1975) (emphasis in original).

Therefore, "when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 28 (1976).

When, as in this case, an association is the only plaintiff, it "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." Warth v. Seldin, 422 U.S. at 511. An association may also have standing if three conditions are satisfied: "(a) its members would otherwise have standing to sue

in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977). In either case, however, the association, as with any other plaintiff, must show it has sustained a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 750 (1984) (emphasis added).

The present petition, as with the Association's prior submissions in the district court and the Court of Appeals, reflects a fundamental misunderstanding of both standing doctrine and the essentially different functions a district court performs when reviewing a motion to dismiss, as

opposed to a motion for summary judgment, which the State filed here after conducting extensive discovery on the standing issue.

When standing is challenged on a motion to dismiss, the court " 'accept[s] as true all material allegations of the complaint, and . . . construe[s] the complaint in favor of the complaining party.' " Pennell v. City of San Jose, 108 S.Ct. 849, 855 (1988) (citation omitted). See also, e.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689-90 (1973). But this presumption that an allegation is true disappears, however, when, as here, the court reviews a properly supported summary judgment motion because then general allegations of harm are insufficient to overcome defendants' contrary summary judgment showing. See generally Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

This Court recently held that general allegations of injury are insufficient to oppose a properly supported summary judgment motion based "on the ground that the plaintiff has failed to show that he is 'adversely affected or aggrieved' " by allegedly unlawful behavior. Lujan v. National Wildlife Federation, 110 S.Ct. 3177, 3186 (1990). Once the moving party meets its burden of showing that "there is an absence of evidence to support the nonmoving party's case," Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), the nonmoving party (here, the Association) must set forth specific facts, rather than "general averments", to withstand a properly supported summary judgment motion. See Lujan, 110 S.Ct. at 3188-89.

Both courts below found that the undisputed material facts demonstrated that (1) the Association had come forward with no

evidence that it had been injured by the MBE law (App. at 16a; 43a-44a); and (2) the Association had, in fact, benefited from the MBE law as at least one contractor joined the Association (and now pays a substantial amount in annual dues) precisely because the Association filed this suit (App. at 16a; 44a); and (3) none of the Association's members had been harmed by the MBE law as not one of its members lost a contract, lost a bid for a contract, nor lost any profits as a result of the MBE law (App. at 19a; 51a); and (4) the Association had no evidence that the State's law had any discriminatory impact on anyone. (App. at 20a; 23a; 44a-49a; 51a;-53a; 56a.)

In sum, the Court of Appeals' application of this Court's well-elaborated standing principles was entirely correct and the petition fails to show why further review of this factually unique and legally

unremarkable case is warranted.

### C. Furthermore, Again As The Court of Appeals Found, The Association Lacks Standing To Sue In A Representative Capacity Because There Is A Direct Conflict Of Interest Between The Association's Litigation Objective And The Interests Of Its Minority Members.

In addition, the Association lacks standing to sue on behalf of its members because, as the Fourth Circuit found, it fails to satisfy the third condition of Hunt associational standing. (App. at 25a-29a.) That prong requires that neither the claim asserted nor the relief requested necessitates the participation of individual members in the lawsuit. See Hunt, 432 U.S. at 343.

The only plaintiff in this case is the Association, which purports to sue in a representative capacity. On the undisputed facts, the Fourth Circuit found that there is a direct conflict of interest between the

Association's minority members who "benefit from the continued enforcement of the MBE statute," and "[o]ther non-minority members of the Association [who] would benefit if the MBE statute were declared unconstitutional." (App. at 27a.) As the Court of Appeals held, this conflict, which was highlighted by the Association's exclusively non-minority Board's totally secretive process in filing this suit (App. at 28a), prevented the Association from meeting the third prong of associational standing under Hunt. (Id.)

Petitioner argues incorrectly that the Fourth Circuit's decision conflicts with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, 477 U.S. 274 (1986). See Petition at 34-37. In Brock, however, unlike here, no evidence of actual conflict

among the association's members was shown.[4] The Fourth Circuit's analysis and conclusion are, therefore, in full accord with Brock and with lower federal court decisions on this issue. See, e.g., Associated General Contractors of North Dakota v. Otter Tail Power Co., 611 F.2d 684 (8th Cir. 1979); Mountain States Legal Foundation v. Dole, 655 F. Supp. 1424 (D. Utah 1987).

Contrary to Petitioner's suggestion, see Petition at 34-38, the decision below is not in conflict with other appellate decisions because none of those supposedly conflicting decisions addressed the types of actually identified, as well as potential, conflicts

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[4] See 477 U.S. at 290 ("[W]ere we presented with evidence [as has been presented in this case] that such a problem existed here or in cases of this type, we would have to consider how it might be alleviated. However, the Secretary has given us absolutely no reasons to doubt the ability of the UAW to proceed here on behalf of its aggrieved members. . . .") (emphases added).

of interest that the Fourth Circuit found prevented this Association from suing as the sole plaintiff on behalf of all of its members.[5]

## CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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[5] In any event, because this case is moot and because the Association lacks standing as it has suffered no injury fairly attributable to the now-repealed MBE law, this case is not an appropriate vehicle for the Court to resolve any arguable conflict on this narrow issue.